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No. 07-635

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

BRUCE PETERS,

Petitioner

v.

VILLAGE OF CLIFTON, an Illinois municipal corporation; ALEXANDER, COX & McTAGGERT, INC.; and JOSEPH McTAGGERT,

Respondents

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

Brief For Respondent In Opposition To Petition

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QUESTIONS PRESENTED

1. Whether a Fifth Amendment takings analysis applies to Petitioner when he has alleged *ultra vires*, unlawful and illegal acts by Respondent and when the Fifth Amendment applies only to authorized governmental acts.

2. If a Fifth Amendment takings analysis applies, whether Petitioner has presented compelling reasons to grant the Petition, where the Seventh Circuit's Opinion affirming the District Court's analysis under *Williamson County* does not conflict with the decisions of this Court or a Court of Appeals, and where Petitioner does not claim the Seventh Circuit's ruling implicates an important federal question that has not been settled by this Court.

CORPORATE DISCLOSURE STATEMENT

Alexander, Cox & McTaggert, Inc., has no parent company and no publicly held company owns 10% or more of that party's stock.

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INTRODUCTION

Petitioner presents no compelling reason for his Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Petitioner fails to demonstrate that the Seventh Circuit's August 22, 2007 Opinion is in conflict with a decision of this Court or another Court of Appeals or that the Seventh Circuit decided an important federal question that has not been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Petitioner has instead shown that the District Court's dismissal of his federal claim was in accordance with this Court's decisions in *Williamson County Reg'l Planning Commission v. Hamilton Bank of Johnson City* and *San Remo Hotel v. County of San Francisco*. Therefore, the Petition should be denied.

Petitioner claims the Court's decision in *Williamson County* should be reconsidered because it prevents him from bringing a Fifth Amendment takings claim in Federal Court and consequently eliminates his federal takings claim altogether.

Petitioner's arguments ignore over 100 years of takings jurisprudence wherein this Court has consistently held there is no Fifth Amendment takings claim when, at the time of the taking, there is a state provision which is "sufficiently reasonable, certain, and adequate to secure just compensation..."

Petitioner presents no compelling reasons for the grant of his Petition. His Petition addresses firmly established issues which do not merit this Court's attention. The Court's decision in *Williamson County* echoed firmly established takings jurisprudence and it was recently reaffirmed by this Court in *San Remo.* Because the Petitioner has failed to carry his substantial burden of demonstrating that there are any compelling reasons for the Court to grant his Petition, the Petition should be denied.

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

I. Background

Petitioner contended in his Complaint, and before the Seventh Circuit Court of Appeals that "the Village's sanitary drainage system and the occupation and use of his property for that system are illegal and unauthorized."App. at A-7. Petitioner also contended in his Opening Brief before the Seventh Circuit Court of Appeals that the government's acts constituted "an *ultra vires* physical occupation of property..." and that there was an "illegal or *ultra vires* invasion of private property." Petitioner requested compensatory damages for the taking and a permanent injunction. App. at A-5.

REASONS FOR DENYING THE PETITION

I. This case is not a proper vehicle for considering whether *Williamson County* should be overruled because Petitioner contends the government's conduct was unauthorized, illegal, and *ultra vires* and such alleged conduct does not give rise to a Fifth Amendment takings claim.

A necessary prerequisite to a Fifth Amendment takings claim is *authorized* governmental action. The Fifth Amendment "does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543, 125 S. Ct. 2074, 2084, 161 L.Ed.2d 876 (2005) (*quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 107 S. Ct. 2378, 96 L.Ed.2d 250 (1987) (emphasis added by Court in *Lingle*)). The Fifth Amendment "presupposes what the government intends to do is otherwise constitutional" and a takings analysis should be reserved for "cases where the governmental action is otherwise permissible." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 545-46, 118 S. Ct. 2131, 2157-58, 141 L.Ed.2d 451 (1998) (Kennedy, J., concurring in judgment and dissenting in part). "[A]t the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing compensation for *legitimate government action* that takes 'private property' to serve the 'public' good." *Eastern Enterprises*, 524 U.S. at 554 (Stevens, J., dissent) (emphasis added). "The

constitutional prohibition against taking private property for public use without just compensation is directed against the government and not against individuals or public officers proceeding" without authority. *Hooe v. United States*, 218 U.S. 322, 335, 31 S.Ct. 85, 89, 54 L.Ed. 1055 (1910).

Consistent with the foregoing, the Court in *Lingle* held that a formula inquiring whether government regulation of private property "substantially advances" legitimate state interest is not an appropriate takings claim test because such test probes the regulation's underlying validity, and not whether just compensation has been provided for an otherwise proper taking. *Lingle*, 544 U.S. at 543. The Seventh Circuit Court of Appeals, in *Chicago, Milwaukee St. Paul and Pacific Railroad Co. v. United States*, 799 F.2d 317, 326 (7th Cir. 1986), *cert. denied*, 481 U.S. 1069 (1987), cited this Court's decision in *Langford v. United States*, 101 U.S. 341, 344-45, 11 Otto 341, 25 L.Ed.2d 1010 (1879) for the proposition that "*[a]uthorized acts* of the government may be takings...but unauthorized or mistaken ones are torts for which the officer alone is answerable." (emphasis added).

Lower federal courts are in agreement that alleged "unauthorized or tortious conduct [by the government] is not compensable under the Fifth Amendment." *Nicholson v. United States*, 77 Fed. Cl. 605, 614 (Fed. Cl. 2007). "[U]ltra vires conduct cannot give rise to a Fifth Amendment taking..." *Del Rio Drilling Programs Inc. v. United States*, 146 F.3d 1358, 1362 (Fed. Cir. 1998). *See also Roedler v. U.S. Dep't of Energy*, 1999 WL 1627346, p. 11 (D. Minn. 1999) (*ultra vires* acts "could not form the

basis of a taking claim"), *aff'd*, 255 F.3d 1347 (Fed. Cir. 2001), *cert. denied*, 534 U.S. 1056 (2001); *Laguna Gatuna, Inc. v. U.S.*, 50 Fed. Cl. 336, 341 (Fed. Cl. 2001) (recognizing only authorized government action can form basis of takings claim; unauthorized acts are viewed as torts, not takings).

Petitioner has alleged illegal, unauthorized, and *ultra vires* acts by the Defendants. Because the Fifth Amendment takings clause presupposes legitimate authorized governmental action, Petitioner has not pled a viable takings claim and the continuing viability of *Williamson County* has no bearing on Petitioner's claim.

II. Petitioner's Petition should not be granted because the Court's decision in *Williamson County* was correct.

A. The *Williamson County* decision re-affirmed more than 100 years of takings jurisprudence

Petitioner's argument that the Court's state compensation requirement set forth in *Williamson County Regional Planing Commission v. Hamilton Bank of Johnson County*, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985) has no plausible support cannot withstand scrutiny. The underlying basis for the *Williamson County* decision dates back to the late 1800s. In *Cherokee Nation v. Southern Kan. Ry. Co.*, 135 U.S. 641, 10 S. Ct. 965, 34 L.Ed. 295 (1890), the plaintiff contended congressional law violated the takings clause because the law did not provide for pre-takings

compensation. This argument was rejected, with the court stating:

> This objection to the act cannot be sustained. The constitution declares that private property shall not be taken 'for public use without just compensation.' It does not provide or require that compensation shall be actually paid in advance of the land to be taken; but the owner is entitled to *reasonable, certain and adequate provision* for obtaining compensation before his occupancy is disturbed.

135 U.S. at 659 (emphasis added). In determining the constitutional requirement had been met, the Court looked to the statutory provisions for obtaining compensation and found they were "sufficiently reasonable, certain, and adequate to secure just compensation..." *Id.*

In accord is the Court's decision in *Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 43 S.Ct. 684, 67 L.Ed. 1167 (1923), wherein the plaintiffs argued a state law was an unconstitutional taking because it authorized the taking of property without an "offer to pay compensation therefor or a determination of it in advance." Rejecting the argument, this Court noted "it has long been settled that the taking of property for public use by a state or one of its municipalities need not be accompanied or preceded by payment, *but the requirement of just*

compensation is satisfied when the public faith and credit are pledged to a reasonably prompt ascertainment and payment, and there is adequate provision for enforcing the pledge." 262 U.S. at 677 (emphasis added). The Court determined, moreover, that the state law's provisions "adequately fulfill the requirement in respect of the ascertainment and payment of just compensation." *Id.* [1] *See also Sweet v. Rechel*, 159 U.S. 380, 16 S.Ct. 43, 40 L.Ed. 188 (1895); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 10, 110 S.Ct. 914, 921, 108 L.Ed.2d 1 (1990) (recognizing Fifth Amendment does not require that just compensation be paid in advance of or even contemporaneously with the taking).

The foregoing cases reflect more than 100 years of takings jurisprudence which was echoed in *Williamson County* and affirmed by the Court in *San Remo Hotel, L. P. v. City and County of San Fancisco California*, 545 U.S. 232, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005). In analogous cases involving takings claims against the federal government, this Court has applied a similar analysis, requiring takings plaintiffs to seek just compensation in the federal court of claims under the

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[1] Petitioner suggests on page 15 of his brief that *Williamson County* is nonsensical because it requires the property owner "to ask the state for compensation before the property owner can sue the local government in federal court." *Williamson County* does not require a property owner to "ask the *state* for compensation," it instead provides that there can be no Fifth Amendment takings claim in federal district court when the property owner has an available compensatory remedy under state law.

Tucker Act before asserting a Fifth Amendment takings challenge in a federal district court. *Preseault*, 494 U.S. at 11-17 (holding takings claim in federal court of appeals was premature because the plaintiff failed to pursue an available remedy in the Court of Claims under the Tucker Act).[2] *See also Bay View, Inc. on behalf of AK Native Village Corps. v. Ahtna, Inc.*, 105 F.3d 1281, 1285 (9th Cir. 1997) (holding federal district court had no jurisdiction to address merits of takings claims where Congress provided a means for paying compensation for any taking that might have occurred); *Schroder v. Bush*, 263 F.3d 1169, 1177 (10th Cir. 2001) (takings claims

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[2] On page 11 of the Brief Amici Curiae for Elizabeth Neumont, Amicus contend *Williamson County's* reliance on *Ruckelshaus v. Monsanto Co.* 467 U.S. 986 (1984) is misplaced because the *Ruckelshaus* plaintiff sought only equitable relief. The Court's decision in *Preseault*, however, parallels the *Williamson County* analysis, concluding a federal court of appeals could not consider a takings claim until the plaintiff avails itself of the process provided by the Tucker Act in the federal court of claims. *Preseault*, 494 U.S. at 11-12. Amici further suggests the Tucker Act line of cases are inapposite, stating "could such a suit be called a prerequisite to asserting a monetary claim against the government for compensation for a taking of property?" The question is not whether a property owner has to ripen his claim to obtain compensation under the Tucker Act; rather, the question is what action a property owner must take to assert a takings claim in federal district court against the federal government. Like state takings, property owners alleging federal takings are required to first assert their takings claim in the Federal Court of Claims under the Tucker Act before bringing a takings claim in a Federal District Court. *Preseault*, 494 U.S. at 17 ("petitioner's failure to make use of the available Tucker Act remedy renders their takings challenge [before the Second Circuit Court of Appeals] to the ICC's order premature").

against federal government in federal district court are premature until property owner has availed itself of process available under the Tucker Act), *cert. denied*, 534 U.S. 1083 (2002).

Decisions from this Court reflect that the determinative issue is not the *compensation owed* to the property owner at the time of the taking; but is instead the *adequacy and availability of the compensatory provisions* at the time of taking. If the state has provisions available for obtaining compensation, the property owner cannot assert a Fifth Amendment takings claim in federal district court.[3]

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[3] In the Brief of Amicus Curiae Joyce Yamagiwa, several words are pulled form various cases and articles to purportedly describe the holding of *Williamson County*. *See* Yamagiwa Brief, pages 6-9. Without reviewing each of the cited authorities, it is impossible to know the context in which the purported words were used. In some cases, the words appear to be taken out of context. As but one example, Amicus cites one authority for the proposition that *Williamson County* was "ill-considered." *Id.* at page 6 (*citing* Thomas E. Roberts, Facial Takings Claims Under Agins-Nector: A Procedural Loose End, 24 U. Hawaii L. Rev. 623, 635 (2002)). That author, however, did not opine that *Williamson County* was ill-considered; he instead indicated the Court's use of the term "ripeness" may have been "ill-considered". 24 U. Hawaii L. Rev. at 635. The author further notes the state compensation rule is not a "ripeness rule", but is "better viewed as an element in the unique Fifth Amendment takings cause of action." *Id.* at 625-26. Amicus' citations, moreover, all pre-date the Court's decision in *San Remo*.

The basis for these decisions stems directly from the express terms of the Fifth Amendment:

> [B]ecause the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied. The nature of the constitutional right therefore requires that a property owner utilize procedures for obtaining compensation before bringing a § 1983 action.

Williamson County, 473 U.S. at 195, fn. 13 (emphasis in original). *See also Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 734, 117 S.Ct. 1659, 1665, 137 L.Ed.2d 980 (1997)(noting the state compensation requirement "stems from the Fifth Amendment's proviso that only takings without 'just compensation' infringe that Amendment").[4] In effect, "the state compensation

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[4] In his concurring opinion in *San Remo*, Justice Rehnquist noted that the court in *Suitum* referred to the state compensation requirements as "merely a prudential requirement." 545 U.S. at 349. Although it is true the *Suitum* Court referred to the *Williamson County* requirements as "prudential," the Court went on to note that "[o]rdinarily a plaintiff *must* seek compensation through state inverse condemnation proceedings before initiating a takings suit in federal court unless the State does not provide adequate remedies for obtaining compensation." *Suitum*, 520 U.S. at 734, fn. 8 (emphasis added). Although the Court's discussion in *Suitim* is arguably *dicta* because the state compensation requirement was not at issue, the language re-affirms, rather than disproves, the constitutional basis for the state compensation requirement.

rule is an element of a Fifth Amendment takings claim." Thomas E. Roberts, Facial Takings Claims Under Agins-Nector: A Procedural Loose End, 24 U. Hawaii L. Rev. 623, 624 (2002).[5]

Petitioner reasons on pages 13-15 of his Brief that because a duty to pay just compensation accrues at the time of a taking, "the issue of whether the taking is 'without just compensation' should also be ascertained at that point." In making this argument, Petitioner ignores this Court's established holdings, both before and after *Williamson County*, that the Fifth Amendment does not require that just compensation be paid in advance of or even contemporaneously with the taking. *See, e.g., Preseault*, 494 U.S. at 10; *Yearsley v. W.A. Ross Const. Co.*, 309 U.S. 18, 21, 60 S.Ct. 413, 415, 84 L.Ed. 554 (1940); *Hurley v. Kincaid*, 285 U.S. 95, 104, 52 S.Ct. 267, 269, 76 L.Ed. 637 (1932); *Cherokee Nation*, 135 U.S. at 649. Thus, while the compensation owed may be measured from the time of a physical intrusion, "as a matter of law, an *illegitimate* taking might not occur until

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[5] In his *San Remo* concurrence, Justice Rehnquist questioned why takings claims should be relegated to state courts while land-use regulations challenged under the First Amendment or the Equal Protection clause can proceed directly to federal court. 545 U.S. at 350-51. The difference in treatment stems directly from the express language of the Constitution. Unlike the Fifth Amendment, the applicability of the First Amendment or the Equal Protection Clause is not dependent upon whether the violation is "without just compensation."

the government refuses to pay..." *First English*, 482 U.S. at 320, fn. 10, (emphasis added).

Whether there has been a taking without just compensation therefore depends on whether, *at the time of the taking*, the plaintiff has a remedy under state law which is sufficiently reasonable, certain, and adequate to secure just compensation and *not* whether compensation has been paid at the time the taking occurred. Because of the express "just compensation" prerequisite, the State's action is not "'complete' until the State fails to provide adequate compensation for the taking." *Williamson County*, 473 U.S. at 195; *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S. Ct. 3194, 82 L.Ed.2d 393 (1984). *See also Hudson*, 468 U.S. at 539 (O'Connor, J., concurring) (plaintiff challenging a taking must either avail himself of the remedies guaranteed by state law or prove the available remedies are inadequate).[6]

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[6] Brief Amici Curiae for Elizabeth J. Neumont suggest this Court failed to apply the state compensation requirements in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1003, 112 S.Ct.2886, 2887, 120 L.Ed.2d 798 (1992) and *Palazzolo v. Rhode Island*, 533 U.S. 606, 606, 121 S.Ct. 2448, 2451, 150 L.Ed.2d 592 (2001). In both of those cases, the Court's recitation of the factual background established the state compensation requirement had been met because, in each case, the property owner had sued for a Fifth Amendment taking in state court.

B. The State Compensation Requirement Does Not Create A Contradictory And Unpredictable Jurisdictional Framework

Petitioner contends the state compensation requirement necessarily means that Fifth Amendment takings claimants will never be able to assert their claim in federal court. Although this may be the outcome in some cases, it is neither contradictory nor unpredictable. With this Court's decisions in *Williamson County* and *San Remo*, there should be no doubt that a Fifth Amendment takings claim cannot be brought in federal district court if there a reasonable, certain, and adequate provision for compensation that is available under state law. There should also be no question regarding the application of *res judicata* to state court decisions. The predictability of the rules set forth by this Court is evidenced by the fact that Petitioner has cited no case occurring after *San Remo* in the context of his "unpredictable" argument. *See* Pet. Brief, pages 16-21.

Despite Petitioner's arguments to the contrary, Plaintiffs asserting federal claims do not have any constitutional right to a federal forum and it is therefore not contradictory to apply the state compensation requirement. *Allen v. McCurry*, 449 U.S. 90, 103-04, 101 S.Ct. 411, 419-20, 66 L.Ed.2d 308 (1980); *Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367, 386, 116 S.Ct.873, 883, 134 L.Ed.2d 6 (1996). In rejecting the plaintiff's argument that he had a right to vindicate federal claims in a federal forum, the Court in *San Remo* stated:

> We have repeatedly held, to the contrary, that issues actually decided in valid state-court judgment may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court...This is so even when the plaintiff would have preferred not to litigate in state court, but was required to do so by statute or prudential rules.

545 U.S. at 342 (citations omitted). The mere fact that a plaintiff's takings claims is litigated in state court produces no untoward result because state courts are deemed fully capable of interpreting and upholding federal law. *Moore v. Sims*, 442 U.S. 415, 429, 99 S.Ct. 2371, 2380, 60 L.Ed.2d 994 (1979) ; *Stone v. Powell*, 428 U.S. 465, 493-94, n. 35, 96 S.Ct. 3037, 3051-52, n. 35, 49 L.Ed.2d 1067 (1976).

Petitioner's suggestion that the state compensation requirement "completely terminates the takings claim" and "deprives the plaintiffs of their Seventh Amendment right to a jury trial" is without merit. Although it is true that a takings plaintiff may be required to litigate his federal constitutional claim in state court, the claim is not eliminated but is instead adjudicated by a state court. Moreover, this Court rejected the "deprivation of jury trial argument" in *Parratt*, stating:

> Although the state remedies may not provide the respondent with all the relief

> which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold they are sufficient to satisfy the requirements of due process.

Parratt v. Taylor, 451 U.S. 527, 544, 101 S. Ct. 1908 (1908), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). In short, Petitioner's implicit and overriding argument that he is entitled to a federal forum was soundly rejected by the Court in *San Remo*. 545 U.S. at 342.

Petitioner's argument also fails to recognize that in considering whether the state compensation requirement is met, federal courts are required to determine whether state law provides a "reasonable, certain and adequate provision for obtaining compensation." *Williamson County*, 473 U.S. at 194.

If the plaintiff proves the state provision is non-existent, unreasonable, uncertain or inadequate or if resort to such provision would be futile, the plaintiff may proceed with his takings claim in federal court.

C. The State Compensation Requirement Does Not Conflict With Removal Jurisdiction

Petitioner implicitly suggests there is continuing confusion because of some defendants attempts to remove takings claims. The cases relied on by Petitioner, however, suggest that any confusion was caused by the plaintiffs' pleading, and not the *Williamson County* state compensation requirement. In *Moore v. Covinton County Comm'n*, 2007 WL 1771384 (M.D. Ala. 2007), the plaintiff had alleged takings claims *and* violations of the equal protection clause. In the remand order, the court found the equal protection violations were not well pled. In *Doney v. Pacific County*, 2007 WL 1381515 (W.D. Wash. 2007), the plaintiff's complaint alleged takings claims *and* violations of substantive due process. Although the court remanded the takings claims, it exercised jurisdiction over and dismissed the due process claim. Also in *Carrollton Properties, Ltd. v. City of Carrollton, Texas*, 2006 WL 2559535 (E.D. Tex. 2006), the complaint alleged takings *and* due process claims. In its remand order, the court determined the due process claim was, in fact, a takings claim.

A defendant that removes a state court action asserting a Fifth Amendment takings claim knows, or should know from this Court's decisions in *Williamson County* and *San Remo*, that it risks remand if the federal district court finds the state compensation requirement

has not been met. A plaintiff that allows such removal without objection faces the same risks.

Although the state compensation requirement may be a trap for litigants whose counsel have not reviewed the law, the requirement is well-established and is not a trap at all.

Petitioner suggests, and Amicus contend, that this Court in *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997), "found removal to federal court appropriate for a federal takings claim." Petitioner and Amicus' statement, however, is unsupported by the *City of Chicago* opinion or the history of that case. As reflected in the district court's opinion, the action was in the lower court "on removal from the state court, given plaintiff's federal constitutional claims that [the defendants' conduct] violated various of plaintiffs' federal *due process and equal protection rights.*" *Intern'l College of Surgeons v. City of Chicago*, 1995 WL 9243, p. 2 (N.D. Ill. 1995) (emphasis added), *rev'd*, 91 F.3d 981 (7th Cir. 1996), *rev'd*, 522 U.S. 157 (1997).

While a federal takings claim was also alleged, it was dismissed with prejudice and all that remained was a takings claim brought under the Illinois Constitution. *Id.* at p. 2, 15. The issue before this Court in *City of Chicago* was whether the federal district court had supplemental jurisdiction over state claims which called for deferential on-the-record review of administrative findings. The Court in *City of Chicago* did not suggest, or

even imply, that removal jurisdiction was predicated on a Fifth Amendment takings claim.

D. Acceptance of Petitioner's theory would impose an unnecessary undue burden on States and their municipalities

The essence of Petitioner's argument is that a property owner should be entitled to assert a Fifth Amendment takings claim in a federal district court at the moment of any taking. Under this theory, the state actor can conceivably avoid a takings claim only if and when a pre-deprivation process has occurred.

As an initial matter, this theory is directly contrary to century-old takings jurisprudence holding the Fifth Amendment does not require compensation to be paid prior to or contemporaneously with the taking. *See, e.g., Cherokee Nation*, 135 U.S. at 659; *Joslin*, 262 U.S. at 677.

From a practical standpoint, such requirement would require the State actor to weigh the risk of a federal lawsuit against a possible exigent need for the taking of the property. Under the *Williamson County* state compensation requirement, post-deprivation compensation to property owners undoubtedly avoids takings litigation in a number of cases.

Under Petitioner's theory, however, the property owner would be entitled to file in lawsuit in federal district court the instant a physical invasion occurs. Allowing such action would not only turn this Court's

takings jurisprudence on its head, it would allow property owners a federal forum the instant a physical intrusion has occurred, thus causing a backlog in an already overloaded federal court system.

The result sought by Petitioner and Amicus Curiae is neither contemplated, nor required, by the Fifth Amendment takings clause. Property owners know, or should know that they must seek compensation under state compensation laws. If an aggrieved property owner does not believe he has sufficiently reasonable, certain, and adequate remedy under state law, he can pursue his takings claim in federal court, with full knowledge that the case may be dismissed if the court finds such provision is available. The property owner does not lose his Fifth Amendment takings claim; to the contrary, he can fully litigate that claim in state court.

Petitioner and Amicus Curiae also assert untold injury because they are required to first seek compensation under the state's compensation provisions. Their argument of "unfairness" or "prejudice" necessarily presumes state courts are incapable of fairly compensating property owners when a taking has occurred. This presumption is just that, with no support in case law or otherwise. As this Court has acknowledged "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations". *San Remo*, 545 U.S. at 347. The unsupported "unfairness" arguments of Petition and Amicus Curiae should be disregarded.

III. *Williamson County* Applies to Allegations Of Physical Takings

Petitioner contends *Williamson County* should apply only to cases involving regulatory takings, and not those involving physical takings. Prior to *Williamson County*, this Court applied a *Williamson County* - type analysis to alleged physical takings and there is no reasoned basis for excluding physical takings from the state compensation requirement. *See, e.g., Yearsley*, 309 U.S. at 21; *Hurley*, 285 U.S. at 104; *Cherokee Nation*, 135 U.S. at 658-659.

The Court in *Williamson County* "drew no distinction between physical and regulatory takings, and the rationale of that case, that a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State...demonstrates that any such distinction would be unjustified." *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 380 (2nd Cir. 1995), *cert denied*, 519 U.S. 808 (1966). *See also McKenzie v. City of White Hall*, 112 F.3d 313, 317 (8th Cir. 1997) (rejecting argument that *Williamson County* did not apply to physical takings); *Belvedere Military Corp. v. County of Palm Beach, Florida*, 845 F. Supp. 877 (S.D. Fla. 1994) (rationale of *Williamson County* equally applicable to physical takings).[7]

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[7] In the Amicus Brief filed by The Coalition for Property Rights, Amicus contend the court in *Asociacion de Subscripcion*

Petitioner's suggestion that physical takings claims have historically warranted scrutiny in federal courts is unsupported by his cited case law as *none* address a Fifth Amendment takings claim against a State government or municipality, *most* do not even address a *physical takings* claim and *none* support the proposition that a federal district court will consider a takings claim when there is a state provision for reasonable, certain, and adequate compensation.

For example, Petitioner cites *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 28 S.Ct.7 , 52 L.Ed. 78 (1907). In that case, the plaintiff complaining of unequal tax assessments alleged a taking of "of property without

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Conjunta Del Seguro De Reponsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1 (1st Cir. 2007) declared *Williamson County* was only applicable to regulatory takings. *See* Coalition for Property Rights Brief, page 8. The *Flores Galarza* court held only that the final decision prong of *Williamson County* was inapplicable to physical takings. 484 F.3d at 15. Amicus also erroneously contend the First Circuit in *Flores Galarza* "determined that *Williamson County's* procedures does not include litigation at all" and that ripeness is satisfied if "all administrative avenues of relief have been cut off." *See* Coalition for Property Rights Brief, page 11; *see also* Brief Amicus Curiae of The American Farm Bureau Federation, page 6, fn. 2. Amicus reads *Flores Galarza* far too broadly as that court recognized *Williamson County* would require "plaintiffs to avail themselves of [an inverse condemnation cause of action] before bringing a federal takings claim..." *Flores Galarza*, 484 F.3d at 17. The *Flores Galarza* court distinguished between "a state takings claim" [which it found was not required by *Williamson County*] and "an inverse condemnation proceeding [which would be required by *Williamson County*] designed to enable plaintiffs to obtain compensation." 484 F.3d at 18.

due process of law" and a denial of "the equal protection of laws", but there was *no* allegation of a physical taking without just compensation. 207 U.S. at 20. The issues before the Court in *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278, 33 S.Ct. 312, 57 L.Ed.510 (1913) likewise did not involve a physical takings claim, but were instead alleged violations of due process arising from a state regulation. In *Western Union Telegraph Co. v. Pennsylvania Railroad Co.*, 195 U.S. 540, 25 S.Ct. 133, 49 L.Ed. 312 (1904), the "construction of the [act of 1866 was] the fundamental question in the case" and the court concluded the act was an exercise of Congress of its power to withdraw from state interference interstate commerce by telegraph. 195 U.S. at 559, 571.

In *United States v. General Motors*, 323 U.S. 373, 65 S.Ct.357, 89 L.Ed. 311 (1945), the United States initiated proceedings to condemn property pursuant to the Second War Powers Act. 323 U.S. at 358. The issue before this Court was the "scope and meaning of" of the takings clause, and not whether a takings claim arising from a state actor taking could be considered by a federal court. 323 U.S. at 377.

The Court's decision in *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979) likewise does not support Petitioner's position. In that case, the issue was whether the government's imposition of a navigational servitude constituted a taking for which just compensation was owed. The underlying action was brought by the United States in

federal district court to determine its regulatory authority and there was no attempt by *Kaiser* to seek "just compensation" in that proceeding. 444 U.S. at 168.

Conspicuously missing from Petitioner's "history" of takings jurisprudence is any citation to *Cherokee Nation, Joslin, Sweet,* or any other historic case indicating the Fifth Amendment takings requirement is satisfied where, at the time of the taking, there is a *reasonable, certain and adequate provision* for obtaining compensation. Petitioner's analysis and case law citations are inapposite and do not support the proposition that *Williamson County* is inapplicable to physical takings.

IV. The doctrine of *stare decisis* warrants denial of Petitioner's Petition for Writ of Certiorari

The doctrine of stare decisis is not an "inexorable command," particularly where an interpretation of the Constitution is at issue. *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 2336, 147 L.Ed.2d 405 (2000). However, "even in constitutional cases, the doctrine carries such persuasive force that [the Court] has always required a departure from precedent to be supported by some 'special justification.'" *Id.* (*quoting United States v. International Business Machines Corp.*, 517 U.S. 843, 856, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996) (*quoting Payne v. Tennessee*, 501 U.S. 808, 842, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991) (Souter, J. concurring)).

As reflected by Petitioner's Brief, this Court has been asked on at least five occasions since *San Remo* to reconsider *Williamson County*. The same reasons for denying *certiorari* in those cases apply with equal force here. The Court's decision in *Williamson County* was not a blip on the radar screen but was instead a recitation of pronouncements made by this Court in the preceding 100 years. Neither Petitioner nor Amicus Curiae have identified any "special justification" for overruling *Williamson County* and the century old takings jurisprudence reflected in that decision. Denial of Petitioner's Petition is warranted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully Submitted,

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